

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 United States of America,

10 Plaintiff,

11 v.

12 Jorge Luis Carrillo-Moreno,

13 Defendant.

No. CV-22-00791-TUC-RM (DTF)

ORDER

14 Pending before the Court is the Government's Motion for Reconsideration of the
15 Court's Order (Doc. 52) and Defendant's Response (Doc. 53). For the following reasons,
16 the Motion for Reconsideration will be denied.

17 The Court's April 24, 2023 Order (the "Order") granted Defendant's Objection to
18 the Magistrate Judge's Report and Recommendation ("R&R") and Motion to Dismiss
19 Indictment. (Docs. 12, 34, 48.) The Order concludes that Defendant's 2012 expedited
20 removal order violated due process by virtue of fundamental unfairness and prejudice
21 because, as Defendant never submitted an application for admission, there was no basis
22 for a determination that Defendant was inadmissible under 8 U.S.C. § 1182(a)(7). In light
23 of *Torres v. Barr*, 976 F.3d 918 (9th Cir. 2020), the Court declined to conclude that 8
24 U.S.C. § 1225 permits an immigration officer to apply 8 U.S.C. § 1182(a)(7) to
25 noncitizens who are physically but unlawfully present in the United States. (*See* Doc. 48.)

26 The Government's Motion for Reconsideration argues that (1) Defendant has not
27 shown that he was improperly deprived of any judicial review to which he was entitled
28

1 under 8 U.S.C. § 1326(d)(2)¹ and (2) Defendant has not shown that the removal order
 2 was fundamentally unfair,² insofar as he has not shown that his due process rights were
 3 violated or that he suffered harm or prejudice. (Doc. 52.) The Government contends that
 4 an alien seeking admission has no constitutionally protected due process rights in his
 5 expedited removal proceeding. (*Id.* at 3.) The Government further contends that the Court
 6 exceeded its jurisdiction by improperly reviewing the merits of the expedited removal
 7 order. (*Id.* at 3-4.)

8 In response, Defendant argues first that the Government’s argument regarding
 9 judicial review fails because the law is well-settled that an expedited removal order does
 10 not provide for judicial review. (Doc. 53 at 1-2 (citing *United States v. Ochoa-Oregel*,
 11 904 F.3d 682, 685 (9th Cir. 2018) (“An alien who has been removed through expedited
 12 removal proceedings automatically satisfies the requirements for exhaustion and
 13 deprivation of judicial review.”)).) Defendant argues that the cases upon which the
 14 Government relies address the issue of judicial review of administrative proceedings, not
 15 a collateral attack on a removal order in criminal proceedings, and therefore do not apply
 16 here. (*Id.* at 2.) Secondly, Defendant argues that he has properly raised a due process
 17 challenge to his expedited removal order via the instant collateral challenge in his
 18 criminal proceeding, and there is no legal authority indicating that this Court lacks
 19 jurisdiction over the matter. (*Id.* at 2-3.)

20 Motions for reconsideration should only be granted in rare circumstances.
 21 *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). “The Court
 22 will ordinarily deny a motion for reconsideration of an Order absent a showing of
 23 manifest error or a showing of new facts or legal authority that could not have been

24
 25 ¹ An alien may not challenge the validity of a deportation order until he demonstrates that
 26 (1) he exhausted available administrative remedies; (2) the deportation proceedings
 27 deprived him of the opportunity for judicial review; and (3) the deportation order was
 28 fundamentally unfair. 8 U.S.C. § 1326(d).

² To establish fundamental unfairness, a defendant must show that the underlying
 proceeding violated his due process rights, and that the violation caused him actual
 prejudice. *United States v. Vega-Ortiz*, 822 F.3d 1031, 1034 (9th Cir. 2016). Removal on
 illegitimate grounds is sufficient to show prejudice, even if an alien was otherwise
 removable. *United States v. Ochoa-Oregel*, 904 F.3d 682, 686 (9th Cir. 2018).

1 brought to its attention earlier with reasonable diligence.” LRCiv 7.2(g)(1); *see also*
2 *School Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)
3 (a motion for reconsideration is appropriate where the district court “(1) is presented with
4 newly discovered evidence, (2) committed clear error or the initial decision was
5 manifestly unjust, or (3) if there is an intervening change in controlling law”). “Manifest
6 error” is an error that is plain and indisputable, and that amounts to a complete disregard
7 of the controlling law or the credible evidence in the record.” *In re Oak Park Calabasas*
8 *Condo. Ass’n*, 302 B.R. 682, 683 (Bankr. C.D. Cal. 2003) (internal quotation omitted).

9 Motions for reconsideration may not repeat any argument made in support of or in
10 opposition to the underlying motion. LRCiv 7.2(g)(1); *see also Motorola, Inc. v. J.B.*
11 *Rodgers Mech. Contractors*, 215 F.R.D. 581, 586 (D. Ariz. 2003) (a motion for
12 reconsideration should not be used to repeat an argument already presented to and
13 rejected by the court). Motions for reconsideration should not be used to ask a court “to
14 rethink what the court had already thought through—rightly or wrongly.” *Defenders of*
15 *Wildlife*, 909 F. Supp at 1351 (citations omitted). Nor should motions for reconsideration
16 be “used to raise arguments or present evidence for the first time when they could
17 reasonably have been raised earlier in the litigation.” *Kona Enterprises, Inc. v. Est. of*
18 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Whether to grant a motion for reconsideration
19 is left to the sound discretion of the trial court. *Navajo Nation*, 331 F.3d at 1046.


20 Having considered the parties’ arguments and the applicable standard of review,
21 the Court will deny the motion for reconsideration. The Government has not raised new
22 facts or legal authority that could not have been brought to the Court’s attention earlier
23 with reasonable diligence. Nor has the Government convincingly shown manifest error.
24 The Order considered and analyzed the relevant case law and statutes and explained the
25 Court’s reasoning regarding their application to Defendant’s case. Ultimately the Court
26 relied primarily on *Torres* to reach its conclusions. The Government presents legal
27 arguments disputing the Court’s findings, but it has not demonstrated that the Court’s
28 reliance on *Torres* was clear error.

1 Furthermore, the Court is unconvinced by the Government's arguments regarding
2 judicial review of expedited removal orders. The Government has not provided a basis
3 for the Court to reconsider its decision—with which the Magistrate Judge agreed—that
4 Defendant satisfied the requirement of § 1326(d)(2).³ The Government's arguments
5 regarding the Court's jurisdiction are likewise unavailing, as it is clear the Court has
6 jurisdiction over Defendant's collateral challenge to his removal. Furthermore, there is no
7 reason why the Government could not have raised this argument previously.

8 Accordingly,

9 **IT IS ORDERED** that the Motion for Reconsideration (Doc. 52) is **denied**.

10 Dated this 5th day of June, 2023.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Honorable Rosemary Márquez
United States District Judge

26 ³ The Magistrate Judge found that Defendant carried his burden of showing he was
27 deprived of judicial review in his expedited removal proceeding. (Doc. 34 at 4.) The
28 Government did not object to this finding. Accordingly, the Government waived the
argument that it now raises. *See* Fed. R. Crim. P. 59(b)(2) (failure to object to the
findings and recommendations of the magistrate judge “waives a party’s right to
review”).